

Conflict of Interest Guidance

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Purpose

The purpose of these guidelines is to assure the Department that its consultants have not entered a contract where there may be a conflict of interest. These guidelines will also ensure that the Department meets Federal requirements related to conflict of interest and will be consistent and fair in the actions taken when a conflict may appear.

It is important to understand the conflict of interest may be direct or indirect (e.g., as a result of a personal or business relationship). Additionally, the appearance of a conflict of interest should be avoided as it may undermine public trust if not sufficiently mitigated.

Federal Highway Administration (FHWA) Requirements

23 CFR, Section 1.33, Conflicts of Interest, states that it is the responsibility of the State to enforce the following requirements of this section:

"No engineer, attorney, appraiser, inspector or other person performing services for a State or a governmental instrumentality in connection with a project shall have, directly or indirectly, a financial or other personal interest, other than his employment or retention by a State or other governmental instrumentality, in any contract or subcontract in connection with such project."

"No officer or employee of such person retained by a State or other governmental instrumentality shall have, directly or indirectly, any financial or other personal interest in any real property acquired for a project unless such interest is openly disclosed upon the public records of the State highway department and of such other governmental instrumentality, and such officer, employee or person has not participated in such acquisition for and in behalf of the State."

"No official or employee of a State or any other governmental instrumentality who is authorized in his official capacity to negotiate, make, accept or approve, or take part in negotiating, making, accepting or approving any contract or subcontract in connection with a project shall have, directly or indirectly, any financial or other personal interest in any such contract or subcontract."

In addition, conflict of interest with regard to Real Estate transactions is addressed in MDOT's Real Estate Procedure Manual as well as in Commission Policy 10013, Right-of-Way Acquisition, Management, Clearance and Sale.

Department Responsibility

Department personnel will review contract relationships and determine if a conflict of interest or the appearance of a conflict of interest exists. This document can be used to guide judgement, but it is not intended to cover every situation. In all cases where a potential conflict of interest exists, the Department may determine that additional controls or procedures should be added to mitigate the potential conflict and obtain FHWA approval for any questionable circumstances. MDOT retains the sole discretion to determine that a conflict of interest disqualifies a consultant

from eligibility for specific contracts or work, or to require that a Consultant implement certain mitigation measures to be eligible to perform, or to complete for specific contracts or work.

Consultant Responsibility

It is the responsibility of the consultant, throughout the life of a project/contract, to manage any avoidance or mitigation of conflict of interest or the appearance of a conflict of interest and notify the Bureau of Finance & Administration Bureau Director (Bureau Director), for determination if new conflict of interest (or appearance thereof) exists. It is the responsibility of the consultant to detect and report any change in its conflict of interest status.

Examples of a Conflict of Interest

The following are examples of relationships that are considered a conflict of interest. (Note, for all these situations, the services are provided on a particular project, not necessarily at the same time).

1. If the consultant or their affiliate works for the Department and the construction contractor on the same project.
2. If the consultant or their affiliate works for the Department and has assisted or represented an adversary interest in connection with the specific Michigan Department of Transportation (MDOT) project.
3. If the consultant or their affiliate provides both Real Estate acquisition and Appraisal services (an exception is when the acquisition is uncomplicated, less than \$10,000 and a Waiver Valuation can be used.)
4. If the consultant or their affiliate works for the department on more than one phase of the same project, they cannot be directly responsible for inspecting/reviewing work that they were responsible for on a previous phase of the project.
5. If the consultant or their affiliate is providing or will provide services to another business entity or organization that is involved with the same project.

The following are examples where the Department will judge based on the circumstances whether a conflict of interest exists or not.

1. If the consultant or their affiliate is the municipal, township, or county engineer on a project that involves that municipality, township, or county.
2. If the consultant or their affiliate works as a prime consultant for the Department and has also worked as a sub-consultant for another prime consultant on another phase of the same project.
3. If the consultant or their affiliate works for the Department on more than one phase of a project (i.e., Planning, Scoping, Early Preliminary Engineering, Design or Construction).

The following is an example of a relationship that is generally not considered to be a conflict or the appearance of a conflict of interest.

If the firm or their affiliate works for another interest, such as a contractor, but on separate projects.

Actions to be taken if a potential conflict is identified:

1. **Prior to Proposal Submittal by Consultant**
If a consultant determines that there may be a conflict or the appearance of a conflict prior to submitting a proposal on an MDOT advertised project, they must submit, in

writing, a detailed explanation of the potential conflict for review and determination by MDOT. This must be sent via email to the Bureau Director. The Bureau Director and additional MDOT leadership will review and determine if a conflict of interest exists. The consultant will be notified, in writing, of MDOT's determination. If it is determined a conflict of interest does exist, the consultant may change their involvement in the proposal to avoid or mitigate the conflict.

2. During selection

The Consultant is required to complete MDOT Form 5100D, Conflict of Interest Statement, each time they submit a proposal. If it is noted by the Selection Team that a conflict or the appearance of a conflict of interest exists, the Selection Team will provide such information in writing to the Bureau Director. The Bureau Director, along with additional MDOT leadership, will determine if a conflict of interest exists. If it is determined a conflict of interest does exist, the consultant will be given the opportunity to avoid or mitigate the conflict. If the consultant cannot avoid, or mitigate the conflict, the proposal will be considered ineligible for selection and the consultant will be informed, in writing, of MDOT's determination. If it is determined a conflict does not exist, the proposal will be scored, and the selection will proceed as usual.

3. After selection approval but prior to contract award

If it is noted by the Project Manager or the consultant that a conflict or the appearance of a conflict of interest exists, the Project Manager or the consultant will contact the Bureau Director, in writing, explaining the perceived conflict of interest. The Bureau Director, along with additional MDOT leadership, will determine if a conflict exists. If it is determined that a conflict of interest does exist, the consultant will be given the opportunity to avoid or mitigate the conflict. If the consultant cannot eliminate the conflict, negotiations will be terminated, and the next most qualified firm will be recommended for selection. The consultant will be notified, in writing, of MDOT's determination. A new selection approval will be processed through the Central Selection Review Team.

4. During the performance of the service

If it is noted by the Project Manager or the consultant that a conflict or the appearance of a conflict of interest exists, the Project Manager or the consultant will contact the Bureau Director in writing explaining the perceived conflict of interest. The Bureau Director, along with additional MDOT leadership, will determine if a conflict exists. If it is determined that a conflict exists, the consultant will be given the opportunity to avoid or mitigate the conflict. Based on the service, progress of work and potential risks, termination of contract or continuing with the service with full disclosure required by the firm and their affiliates may be required. The consultant will be notified, in writing, of MDOT's determination.

Actions to be taken if the consultant is required to submit a mitigation plan as identified prior:

1. If a conflict of interest cannot be avoided and the consultant submits a mitigation plan, the mitigation plan will be submitted to the Bureau Director in writing.
2. It is expected that the consultant's mitigation plan will include detailed descriptions of the work that was performed, and is proposed to be performed, for each phase of a project. This description must include the vendor's level of authority in each phase, and whether they worked as a prime-contractor, sub-contractor, or for another agency involved with the project. The vendor must discuss how the work items are or

are not related, identify all potential conflicts, and propose controls for how each potential conflict will be mitigated. Mitigation could include, but is not limited to, efforts such as limiting roles to only unrelated work, ensure there would be no authority to inspect or approve work done in a prior phase, or other procedural checks and balances.

3. The Bureau Director and MDOT leadership will determine if the mitigation plan sufficiently addresses the conflict of interest. It will be solely MDOT's decision to determine if the mitigation plan eliminates the conflict of interest. If approved, the mitigation plan will be provided to the MDOT Project Manager to ensure its compliance.

The following is the language that is placed in all Contracts:

The Consultant and its Affiliates agree not to have any public or private interest and shall not acquire directly or indirectly any such interest in connection with the project, that would conflict or appear to conflict in any manner with the performance of the Services under this Contract. "Affiliate" means a corporate entity linked to the Consultant through common ownership. The Consultant and its Affiliates agree not to provide any services to a construction contractor or any entity that may have an adversarial interest in a project for which it has provided services to MDOT. The Consultant and its Affiliates agree to disclose to MDOT, in writing, all other interests that the prime or sub consultants have or contemplate having during each phase of the project. The phases of the project include, but are not limited to, planning, scoping, early preliminary engineering, design, and construction. In all situations, MDOT will decide if a conflict of interest exists. If MDOT concludes that a conflict of interest exists, it will inform the Consultant, and its Affiliates, in writing. If the Consultant and its Affiliates choose to retain the interest constituting the conflict, MDOT may terminate the Contract for cause in accordance with the provisions stated in this contract.